

I. INTRODUCTION

- [1] Eulalie Ussak has entered a guilty plea to a charge of manslaughter in relation to the death of Kenneth MacFarlane on December 12, 2009.
- [2] In the context of this case, the manslaughter plea is based on the fact that Ms. Ussak committed an unlawful act which was inherently dangerous and from which, it was foreseeable that there would be significant harm to another.
- [3] In addition to the submissions from counsel, the Court has before it the following information to assist it in determining a fit sentence:
- an Agreed Statement of Facts;
 - evidence from Ms. Ussak;
 - evidence from Ms. Ussak's sister;
 - report of Dr. Ahmed, forensic psychologist, based on meetings with Ms. Ussak on March 16 & 17 and April 25, 2012;
 - report of Dr. Ahmed based on a meeting with Ms. Ussak on March 16, 2013;
 - pre-sentence report dated February 24, 2013;
 - letters of support for Ms. Ussak;
 - criminal record of Mr. MacFarlane.

II. FACTS

- [4] Ms. Ussak and Mr. MacFarlane were in a relationship for 9 years and had lived together for 8 years. Ms. Ussak's teenage daughters from a prior relationship, ages 18 and 13, lived with the couple in a home owned by Ms. Ussak. Adjacent to the house was a shack which Mr. MacFarlane had outfitted with electricity, a wood stove, and furniture. He spent a considerable amount of time in and around the shack, fixing snowmobiles and relaxing in the shack, where he could smoke and drink, activities that were not allowed in the house.

- [5] In December of 2009, Ms. Ussak worked at the youth correctional facility in Iqaluit and sometimes had to travel for her work. Mr. MacFarlane worked as a cook at camps so when he was in Iqaluit he was on his days off.
- [6] The relationship was a difficult one. The deceased physically and verbally abused Ms. Ussak throughout the time they were together and particularly during the latter part of the relationship.
- [7] On December 12, 2009, Ms. Ussak returned to Iqaluit following a six day work trip to Ottawa. She was very tired as she had worked long hours in Ottawa, supervising a particularly difficult client. When she returned to the home she found Mr. MacFarlane in the shack, drinking. She wanted him to stop drinking and join her and her two daughters and two grandchildren in the house. On multiple occasions she went out to the shack to try and persuade Mr. MacFarlane to come in to the house. On at least one occasion he did come in to the house, however, once there he started yelling at Ms. Ussak about the home being dirty and messy. This was an ongoing issue in the family. Mr. MacFarlane would constantly complain about the house being messy and over the years Ms. Ussak had become compulsive about cleaning the house so as to avoid confrontations. On a couple of occasions when Ms. Ussak went to the shack she accepted drinks offered up by Mr. MacFarlane, although she drank little and poured part of her drink on the floor when he was not looking. The evidence suggests that she accepted the drinks in an effort to placate Mr. MacFarlane.
- [8] As the afternoon moved on to the evening and Mr. MacFarlane continued drinking in the shack, Ms. Ussak became increasingly frustrated with the situation. At one point her daughter heard her mother yell at Mr. MacFarlane "I'm going to burn that shack down. I want you to be inside the house and have some time with us instead of the shack". Sometime later Ms. Ussak was overheard speaking to a neighbour on the phone and angrily saying "I'm going to burn that fucking shack down."

- [9] It was shortly after that phone call that Ms. Ussak asked Mr. MacFarlane's nephew to take the two grandchildren to a relative's house and to then come back and pick up her and her two daughters. It was not unusual for Ms. Ussak to take the children and go and stay at a relative's house when Mr. MacFarlane was drinking.
- [10] While she and her daughters were waiting for the nephew to return, Ms. Ussak again went to the shack. She and Mr. MacFarlane continued arguing. Mr. MacFarlane did not want to leave the shack and continued to accuse Ms. Ussak and her daughters of not keeping the house clean. Ms. Ussak said she hated the shack and Mr. MacFarlane said he loved the shack and the two of them continued yelling and arguing.
- [11] Ms. Ussak picked up a jerry can of gas which was next to the shack and poured some gasoline in the doorway to the shack. She then got in the truck with Mr. MacFarlane's nephew and her daughters and left. As she did so, Mr. MacFarlane continued yelling at her, calling her a whore, a slut, and a pig.
- [12] It was only 2-4 minutes after Ms. Ussak had poured gasoline in the doorway of the shack that the structure was in flames. Ms. Ussak and her daughters saw the flames as they were driving away from Apex, towards Iqaluit. Ms. Ussak's daughter said they needed to go back to the house but Ms. Ussak replied "no, we should wait half an hour."
- [13] Ms. Ussak and her daughters continued on to Iqaluit and no one attempted to contact the fire department or any other emergency responders until Ms. Ussak's daughter called the fire department from the house in Iqaluit.
- [14] Later that evening Ms. Ussak called a coworker. She was in tears and asked that he come to the house she was at. When he arrived Ms. Ussak told him that there had been a fire at the shack and the two of them drove there. Firefighters were on the scene and Ms. Ussak began crying and said "I think he's dead...I love him, he's my whole life, I hope nothing happened to him."

[15] Mr. MacFarlane was not all right. He had died in the fire. He was found on the floor of the shack, close to the wood stove. His body was badly burned.

[16] The source of ignition was never determined. There were three possible sources: the wood stove, a candle, or a cigarette.

[17] Ms. Ussak was arrested shortly after and charged with murder. She provided a statement to the police in which she admitted to pouring gasoline in the doorway of the shack but denied igniting it.

III. SUBMISSIONS

A. The positions Of Crown and Defence

[18] The Crown seeks a sentence of imprisonment of two years less a day followed by probation.

[19] The Defence seeks a suspended sentence and probation.

IV. THE VICTIM

[20] It is the nature of sentencing proceedings in criminal matters that the Court is going to hear much more about the offender than the victim. Despite this, it is important to remember throughout this process that a life has been lost and the effect on the family is unimaginable and everlasting.

[21] The Court has heard much about the character of Mr. MacFarlane that portrayed him in a negative light. Like all of us, I expect Mr. MacFarlane had his strengths and weaknesses and many aspects to his personality, some positive and some negative.

[22] He was the father of two children, a daughter and a son. It seems that his relationship with the mother of his children did not work out and Mr. MacFarlane moved north to work as a chef, a career his own father had pursued. He maintained contact with his children and, on occasion, brought them north to work with him. By all accounts he had a good relationship with his children, providing support, both emotional and financial, as a father does. His daughter was present in court during these proceedings and one of his brothers participated in the proceedings by telephone.

[23] Regardless of the sentence imposed today, Mr. MacFarlane is gone and his family must carry on without him. I want the family to know that although the court process is very much focused on the offender, the fact that a life has been lost is not forgotten.

V. EVIDENCE

A. Conflicts in the evidence

[24] There are some areas where the information in the pre-sentence report, Dr. Ahmed's reports, and the evidence of Ms. Ussak are not consistent. The information relates to Ms. Ussak's relationships with her mother, her first husband, and Mr. MacFarlane. In some instances the information appears contradictory and in other areas Ms. Ussak, over time, describes the relationships as more difficult or abusive than she initially did.

[25] Ms. Ussak testified that she is a very private person. She had worked with the person who interviewed her for the pre-sentence report and she felt uncomfortable sharing details of her private life. She testified that she felt more comfortable sharing information with Dr. Ahmed as he was from out of town.

[26] It is not unusual for women in abusive relationships to hide the abuse, even from those they are close to. It takes time to establish a relationship of trust, such that anyone feels comfortable sharing details of their intimate lives. I accept that this accounts for some of the apparent inconsistencies in the information provided by Ms. Ussak.

(i). Conflicts in evidence regarding her home life and her relationship with her mother

[27] There is some conflicting evidence before the Court regarding Ms. Ussak's background. Specifically, there is conflicting information regarding her childhood and her relationship with her mother.

[28] In the pre-sentence report, Ms. Ussak stated that she had no unresolved issues or childhood trauma that currently affect her. She reported feeling loved by her family and described a close relationship with her mother, indicating that she respects her mother's advice and opinions and that she feels comfortable talking to her mother as her mother will not judge her.

[29] Dr. Ahmed's first report does not refer to Ms. Ussak's relationship with her mother. However, in his second report he states that Ms. Ussak "gave an account of a longstanding conflictual relationship with her mother whom she describes as strict, uncaring and quick to blame when she made a mistake." Ms. Ussak described an incident where she felt her mother was judging her harshly and stated that she felt lonely as there is no one to confide in.

[30] I also had the benefit of hearing from Ms. Ussak's sister regarding their upbringing. Although the parents may have been strict with their children, it is clear that the children were well cared for and that the parents provided a safe and secure home, free of alcohol, drugs, and violence.

(ii). Conflicts in evidence regarding her first marriage

[31] There is also conflicting evidence regarding Ms. Ussak's relationship with her first husband. In the pre-sentence report, Ms. Ussak reported that their relationship became one of constant arguing and fighting and that, while the fights were never physical in nature, there was mental abuse.

[32] During her meetings with Dr. Ahmed in 2012, Ms. Ussak described her first marriage as “perfect” but also stated that her first husband was physically aggressive towards her. In 2013, she disclosed more details of the relationship to Dr. Ahmed and, again in court, she provided even further details.

[33] It is fair to say that the allegations regarding Ms. Ussak's first husband appear to become increasingly serious as more information is disclosed by her.

[34] It is difficult to determine how to deal with this information. The information regarding the first marriage comes from the perspective of Ms. Ussak. No one has spoken with the first husband nor has he had the opportunity to respond to the allegations. His perspective may be quite different. Of course, the first husband is not on trial in these proceedings and the Court must be cautious that the process does not get sidetracked by matters that are not central to the matter to be decided.

[35] I accept that the marriage was difficult but in my view it is not necessary for me to go beyond that for the purposes of determining a fit sentence. While the circumstances of the first marriage are part of Ms. Ussak's background, which I must consider in determining a fit sentence, beyond that they are not germane to the issues before the Court.

(iii). Conflicts in evidence regarding her relationship with Mr. Macfarlane

[36] It is not in dispute that Mr. MacFarlane was both physically and verbally abusive towards Ms. Ussak. This is in the Agreed Statement of Facts and it is further agreed that the abuse is corroborated by witnesses and by RCMP occurrence reports.

- [37] There is some dispute over the extent of the abuse. The Crown submits that Ms. Ussak's allegations of abuse increased in seriousness as the sentencing hearing drew near. In particular, they point to the allegations of sexual abuse, which were not disclosed until recently, and submit that the allegations of abuse are exaggerated in order to gain a benefit on sentencing.
- [38] The Defence submits that underreporting is consistent both with Ms. Ussak's private nature and with the behaviour of abuse victims generally.
- [39] I accept that Ms. Ussak engaged in sexual activity that she was not comfortable with. While the degree of actual coercion exerted upon her is not clear, it is clear that she participated in these activities not out of choice, but because she felt she must, either because of the fear of force or to pacify Mr. MacFarlane in an attempt to maintain some calm in the relationship.
- [40] The evidence is clear that Mr. MacFarlane drank heavily and was abusive when drunk. He was obsessed with the cleanliness of the house to the point where Ms. Ussak was ever vigilant regarding the state of the house. To this day she finds herself constantly cleaning. It is clear that the family lived in a constant state of tension and that Ms. Ussak was forever attentive to Mr. MacFarlane's moods and state of sobriety so that she could pacify him and try to avoid confrontation. It was common for her to gather up her children and grandchildren and go to stay at her daughter's house when Mr. MacFarlane was drinking.
- [41] The drinking and the abuse took place in the shack so it is quite understandable that Ms. Ussak viewed the shack as being part of the problem. Drinking and smoking were not permitted in the house. In Ms. Ussak's mind, if the shack were not there, perhaps Mr. MacFarlane would not drink to the same extent and the family could be together in the house under pleasant circumstances.

- [42] The Ontario Court of Appeal in *R v Craig*, 2011 ONCA 142, 84 CR (6th) 155, held that the sentencing judge must assess the mitigating significance of abuse suffered by the offender at the hands of the victim, not by reference to the nature of the abuse but rather, by the impact the abuse has on the offender.
- [43] In this regard, I have the evidence of Dr. Ahmed who concluded that Ms. Ussak suffers from post-traumatic stress disorder as a consequence of her dysfunctional relationship with Mr. MacFarlane and the tragic event of his death. It is not possible to determine whether the post-traumatic stress is due to the relationship or to the circumstances of Mr. MacFarlane's death. Most likely it is a combination of the two.
- [44] It is also important to consider what is not being alleged. There is no suggestion that Ms. Ussak suffered from "battered women's syndrome" and, as a consequence, was psychologically unable to leave the relationship. There is no suggestion that she was acting in self defence. Neither counsel suggested that on the evening in question she was provoked and unable to control her emotions or reactions.

B. Background of the accused

- [45] Ms. Ussak is now 53 years of age. She was born and raised in Rankin Inlet. Her parents had many children and brought others into their home through adoption. There were approximately 17 children in total, however, some died when young. It was a very large family.
- [46] Ms. Ussak came from a good home. Her parents grew up living a very traditional lifestyle, however, her father took work in the wage economy, working in the mine in Rankin to support the family. At the persistence of his wife he left the mine because the work was so dangerous and went to work as a janitor at the school.

- [47] Ms. Ussak's parents lived a meld of a traditional and a modern life. Although employed in the wage economy, her father hunted. The family was never without country food. The family spent summers camping and the children were taught the traditional ways of preparing food. Ms. Ussak is a skilled seamstress; skills that I am sure she learned from her mother.
- [48] Ms. Ussak left home at 19 and moved to Iqaluit to join the Air Force. It was here that she met her first husband. They were together for 22 years and had six children. The breakdown of the marriage was difficult and left Ms. Ussak with children to support. Her youngest child was a toddler at the time. Despite having never been in the wage economy, Ms. Ussak obtained employment and has worked since that time.
- [49] She has been employed with the women's shelter and, at the time of her arrest, was employed at the Young Offenders' facility, employment she had held for approximately 7 years. That employment came to an end when she was charged.
- [50] Ms. Ussak did not receive financial or other support from the father of her children following their separation. There can be no doubt that it was a struggle to provide for the family yet Ms. Ussak managed to do so, maintaining the mortgage and expenses related to home ownership up until she was charged.
- [51] By all accounts Ms. Ussak is a wonderful mother and grandmother. It is clear that her family is her first priority and she has always supported her children and grandchildren. Throughout the court process she has come to understand that they also support her.
- [52] Upon being charged in relation to the death of Mr. MacFarlane, Ms. Ussak was remanded into custody at the Baffin Correctional Centre. At that time there was no separate unit or facility for women. Her time in custody was extremely difficult. Because of the lack of facilities for women, she was in her cell 23 hours a day. She lost 30 lbs. during the 40 days she was in Remand and the authorities had serious concerns for her health.

[53] She was granted release and was required to reside in Rankin Inlet until April, 2011, at which time the conditions of release were varied so that she could live in Iqaluit.

[54] Ms. Ussak has tried to make good use of her time while awaiting resolution of this matter. She obtained employment as a housekeeper at a hotel but was let go when the employer became aware of the pending charges. She enrolled in courses at Arctic College but quite understandably had difficulty focusing and did not pass her courses.

VI. THE PRINCIPLES OF SENTENCING

[55] Section 718 of the *Canadian Criminal Code*, RSC 1985, c C-46 [Criminal Code], sets out the purposes and objectives of sentencing. They are:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and others;
- (c) where necessary, to separate the offender from society;
- (d) to assist in rehabilitating the offender;
- (e) to provide reparations for harm done;
- (f) to promote a sense of responsibility in the offender and to acknowledge the harm done.

[56] Section 718(1) of the Criminal Code states:

“A sentence must be proportional to the gravity of the offence and the degree of responsibility of the offender”.

[57] In determining the appropriate sentence, I am directed to consider the aggravating and mitigating circumstances in the commission of the offence (Criminal Code, s. 718.2(a)). I am also directed to consider the least restrictive sentence that is consistent with the sentencing principles and, particularly in relation to aboriginal offenders, I must consider all available sentences other than imprisonment that are reasonable in the circumstances (Criminal Code, ss.718.2(d), 718.2(e)).

[58] Parliament has provided for a wide range of possible sentences for the offence of manslaughter, ranging from a suspended sentence and probation to life imprisonment (Criminal Code, s. 236(b)). This is not a theoretical range. It is not an offence for which the actual sentences imposed will, in fact, cover a much narrower range than that provided for in the law. A review of the cases supports the proposition that a wide range of sentences are imposed for manslaughter convictions and each is very dependent on the facts of the particular offence and the circumstances of the particular offender.

[59] In 1995, Parliament enacted provisions in the Criminal Code which provide that an offender who is sentenced to a term of imprisonment of less than two years may, provided the court is satisfied certain criteria are met, serve the sentence of imprisonment in the community. This type of sentence is called a Conditional Sentence. From 1995 to 2007, offenders convicted of manslaughter were eligible for conditional sentences. In 2007, Parliament changed the provisions relating to conditional sentences such that offenders convicted of manslaughter are no longer eligible for a conditional sentence (Criminal Code, s.742.1).

[60] However, a suspended sentence and probation for a manslaughter conviction remains a sentencing option that Parliament did not see fit to remove.

[61] I do not take the amendments to the Criminal Code provisions relating to conditional sentences as a statement from Parliament that the court's approach to determining the appropriate sentence for manslaughter is to be different from what it was prior to the amendments. It is a statement that, should the court determine that the appropriate sentence is one of imprisonment, that term of imprisonment, for what Parliament views as legitimate public policy reasons, must be served in a correctional facility and not in the community.

[62] Counsel have filed many cases dealing with spousal manslaughter which have been of assistance to the Court. Of course, within the category of spousal manslaughter there are as many differing circumstances as there are offenders. At the risk of oversimplifying a complex matter, there are two types of cases which tend to appear in the cases. There are those in which the offender was abusive towards the victim throughout the relationship and the death was the culmination of years of abuse, and those in which the offender was the victim of repeated abuse and the death was a final lashing out towards the abuser. This case falls into the latter of those categories.

[63] The cases in this category demonstrate that the sentences imposed take into consideration the context and the relationship within which the offence was committed and cover a range from a suspended sentence and probation to penitentiary terms.

[64] It is my duty to consider Ms. Ussak's circumstances as an aboriginal offender in determining a fit sentence. As stated by this court in paragraph 20 of the unreported decision, *R v Egeesiak*:

The systemic factors that influence criminality in Nunavut are well known and well documented. Residential schools and their inter-generational impact; overcrowded, sub-standard housing; poverty; low levels of education and employment; high rates of alcohol and substance abuse; high rates of domestic violence and sexual abuse; high rates of suicide; all contribute to a crime rate and incarceration rate significantly higher than the national average.

[65] Although the impact of these systemic factors may not have directly impacted on Ms. Ussak's family home during childhood, she is part of a wider community and population within which all members are impacted. The fact that Ms. Ussak has, to a great extent, been able to overcome these influences only speaks to her personal strength.

A. Application of sentencing principles to this case

[66] I consider the following factors to be aggravating for the purposes of sentencing.

[67] In the hours leading up to the fire, Ms. Ussak was overheard to say on at least two occasions that she was going to burn the shack down. This suggests an element of premeditation.

[68] While driving away from Apex, within minutes of the fire starting and under circumstances in which she must have been aware of the likelihood of Mr. MacFarlane still being in the shack, Ms. Ussak did not call for help and she dissuaded her daughters from doing so.

[69] Ms. Ussak acted purely out of anger.

[70] Section 718.2 of the Criminal Code states that evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner, shall be deemed to be an aggravating circumstance on sentence.

[71] The policy reason behind this provision is readily understandable. The spousal relationship is intended to be one of mutual trust, respect, and support. An abuse of one's spouse violates the foundations of the intimate relationship. However, the policy reason for the statutory provision may not be as compelling in circumstances where the offender before the court was the victim of abuse throughout the relationship. As stated by Justice Watt in *R v Foy*, [2002] OJ No. 4004, 2012 CarswellOnt 6124, at para 77:

[...] I am doubtful that the fact that the deceased was a domestic partner, usually an aggravating principle under section 718.2(a)(ii), adds much here. The killing partner here held no economic or emotional advantage over the other. The recorded instances of abuse were more directed towards the accused than initiated by her. It seems somewhat incongruous to consider conduct that often results from years of abuse to be aggravated by the simple fact that the deceased-abuser and accused-killer stood in a defined relationship to each other. It is akin to telling the abused that we recognize the syndrome, but if you kill, we will consider your offence aggravated because you killed your battering partner.

[72] I consider the following factors to be mitigating for the purposes of sentencing.

[73] Ms. Ussak has plead guilty to the offence.

[74] I accept that Ms. Ussak's expression of remorse is genuine. There is no doubt that she will continue to suffer from what has happened long after the court process is concluded.

[75] Ms. Ussak comes before the Court as a person of prior good character. She is of low risk to reoffend.

[76] The abusive nature of the relationship played some role in the events of that evening and are mitigating on sentence.

[77] Ms. Ussak had a difficult experience in pre-trial custody and, since being released on bail, has continued to experience loss by her inability to gain employment and the loss of her home.

[78] There is significant family and community support for Ms. Ussak.

VII. CONCLUSION

A. The sentence

[79] Having carefully considered all the factors that I must, I have determined that a period of incarceration is required in this matter to reflect the seriousness of the offence and to express society's denunciation.

[80] The appropriate sentence, given the offence and Ms. Ussak's personal circumstances, is a sentence of one year imprisonment. Ms. Ussak will be given credit for her time in pretrial custody on a 1:1.5 basis, for a credit of 60 days. The term of imprisonment to be served as of today is 10 months.

[81] That will be followed by a period of probation of 2 years. The terms of the probation order are:

- you will keep the peace and be of good behaviour;
- you will appear before the court when required to do so;
- you will notify the court or your probation officer in advance of any change of name or address or any change of employment or occupation;
- you will report to the probation officer within 5 days of your release from custody and thereafter as directed;
- you will take such counselling as directed by your probation officer.

B. Ancillary orders

[82] There will be a firearms prohibition pursuant to Criminal Code s. 109 for a period of 10 years.

[83] There will be a DNA order pursuant to Criminal Code s.487.051.

Dated at the City of Iqaluit this 31st day of May, 2013

Justice S. Cooper
Nunavut Court of Justice